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No. 373

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL TRAILER CONVOY, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

JURISDICTIONAL STATEMENT

APPEAL FROM UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OKLAHOMA (THREE JUDGE COURT)

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL TRAILER CONVOY, INC., *Appellant,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees.*

JURISDICTIONAL STATEMENT

The Appellant, NATIONAL TRAILER CONVOY, INC., in compliance with the requirements of United States Supreme Court Rule 15, states:

1. The opinions delivered in the court below were not, so far as Appellant knows, reportedly officially or unofficially. Copies of the written opinions are appended hereto.

2. This appeal is taken pursuant to 28 U. S. C. Sec. 1253 and is a direct appeal to the United States Supreme Court from an order denying, after notice and hearing, an injunction in a civil action required by 28 U. S. C. Sec. 2325 to be heard and determined by a district court of

three judges. Appellant sought to enjoin and set aside an order of the Interstate Commerce Commission in a three judge court in the United States District Court for the Northern District of Oklahoma.

3. The judgment sought to be reviewed was entered on March 22, 1965. The time of its entry was not recorded. The order denying Appellant's Petition for Rehearing was entered April 26, 1965.

Notice of Appeal was filed with the Clerk of the United States District Court for the Northern District of Oklahoma, on May 18, 1965.

4. Jurisdiction is conferred on the United States Supreme Court by 28 U. S. C. Sec. 1253. Cases believed to sustain this Court's jurisdiction include:

U. S. v. *U. S. Smelting, Refining and Mining Co.*, 339 U. S. 186;

U. S. v. *Baltimore and Ohio R. R.*, 333 U. S. 169;
I. C. C. v. *New York, New Haven and Hartford R. R.*, 372 U. S. 744.

5. THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL:

Issue No. 1: Whether the District Court erred in affirming an interpretative ruling of the Interstate Commerce Commission that, as here pertinent, is not supported by any substantial evidence of record and which is without rational basis.

Issue No. 2: Whether the District Court erred in holding that sectional mobile homes are not trailers for

the reason that they are not built in single units and are not intended to retain their mobility.

Issue No. 3: Whether the distinction between a trailer and a prefabricated building established by the Interstate Commerce Commission in its interpretation of Plaintiff's certificate is both invalid and unintelligible.

Issue No. 4: Whether the Interstate Commerce Commission, without reference to or reliance upon the transportation characteristics of the commodities involved, did, in fact, in construing Appellant's authority, rely on new and unreasonable standards, never before utilized.

Issue No. 5: Whether the Interstate Commerce Commission may unilaterally atomize a motor carrier's authority by construing a certificate authorizing the transportation of "trailers, designed to be drawn by passenger automobiles," to embrace only a limited number of trailers in existence when the certificate was granted and to exclude all other types of trailers retaining similar transportation characteristics and mode of design in the natural evolution of the mobile home or house trailer industry following the date of the certificate.

6. STATEMENT OF THE CASE:

This case involves findings of the Interstate Commerce Commission which are not supported by the evidence and unreasonable and arbitrary conclusions which not only overturned a carefully prepared examiner's report, but upset much precedent within the Commission's own body of decisions. It is respectfully suggested that

review by this Court is essential to remedy the errors of the Commission and of the Court below.

Appellant, National Trailer Convoy, Inc., for many years has been authorized under various authorities to transport "trailers designed to be drawn by passenger automobiles". These have been determined over the years by the Commission to be trailers pulled by hitchball rather than the fifth wheel used on large trailer vans. The bulk of the items transported under its authorities have been house trailers or mobile homes, as they are now more often called. In recent years manufacturers have begun the construction of the mobile homes in two parts to be joined together at destination to form one home. The under carriages for these two part homes are the same as those for the one section home. The double-homes are frequently placed in mobile home parks and resemble in many ways the smaller one section mobile homes. In fact, they retain their mobility for further moves although the Interstate Commerce Commission found exactly the opposite on wholly inadequate evidence.

Pursuant to an application, National Trailer Convoy, Inc., Appellant herein, of Tulsa, Oklahoma, sought a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, for the transportation of various items, including "sectionalized mobile homes." The application was referred to an examiner for the I. C. C. and a hearing was held. Following the hearing, Appellant moved for a dismissal of the application based upon the proposition that its present certi-

ficated authority included the authority to transport the items in question as "trailers designed to be drawn by passenger automobile". One protestant joined in said motion and the remaining protestants opposed.

The examiner, in his written report to the Commission, recommended dismissal of the application and concluded that all of the various items were "trailers designed to be drawn by passenger automobile", and, therefore, within Appellant's existing authority.

Division 1 of the I. C. C. affirmed the examiner's findings except as to the so-called "sectionalized mobile homes", which the Commission reversed without taking additional evidence or remanding for further evidence. Petitions for reconsideration were denied.

Appeal to a three-judge United States District Court for the Northern District of Oklahoma was effected, by Appellant herein seeking an injunction of the Commission's order. The injunction was denied and Appellant seeks this Court's review of the proceedings.

7. REASONS FOR PLENARY CONSIDERATION:

This is a case in which the Interstate Commerce Commission reversed its own examiner and reached a conclusion as to "sectionalized mobile homes" which was not supported by substantial evidence.

The homes in question are manufactured in two parts and transported on wheels from the factory to their initial location. The examiner held that they were "trailers" within the meaning of Appellant's authority in the light of the method of shipment.

The Commission reversed its examiner as to these items on the stated ground that "In each case the undercarriages are removed and returned to the shippers and the houses permanently situated at the points of destination". This statement was *not* supported by the evidence which was that in *some* cases the undercarriages were removed. There is of course a vast difference in construing evidence that *some* carriages were returned, at dealers option, to mean that *all* undercarriages were returned. This bears directly on the key question of the retained mobility of the homes and is but one example of the loose and erroneous treatment of the evidence. Upon the unfounded assumption that these were manufactured houses which once moved were permanently situated, the Commission held they were not "trailers".

The Commission's conclusion is insupportable. The hearing before the examiner was not conducted with the theory in mind upon which the Commission acted. The "evidence" to support the Commission's findings is limited to a sentence or two from a magazine advertisement which was introduced as an exhibit and a few lines of inconclusive testimony.

The nature of the evidence is reflected by the comments of the court below that "the facts pertaining to mobility were only casually presented to the examiner".

The District Court below evidently felt that National Trailer Convoy, Inc. had the duty of presenting evidence to the Commission and therefore cannot complain of lack of evidence. The Court's statement in its opinion on

rehearing was "National had the burden of satisfying the Commission that the sectionalized homes are within its authority." We do not construe this to be the law. An administrative agency acts for the public. The proceeding before the Commission is not an adversary proceeding. The Commission should not decide a matter on inadequate evidence regardless of whether a party did or did not make a proper presentation. It is respectfully urged that this Court should give plenary consideration in this case for the purpose of clarifying this principle.

The decision is of tremendous importance to Appellant and to the mobile home industry in that an important segment of the industry's production is taken from the carriers equipped to handle it and given to others.

The public interest in this case lies in the abuse of the administrative process when the Commission distorts scraps of evidence to reverse its own examiner and decide an important matter without receiving sufficient evidence on the issue of decision. Briefing and argument are required to point out the lack of foundation for the Commission's ruling. Certainly this is a substantial question which goes to the very heart of the administrative system. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474.

8. The following opinions are appended hereto, lettered as hereinafter shown, and constitute all written opinions delivered in this case:

A. I.C.C. examiner's Report and Recommended Order in No. M. C.-106 398 (Sub.-No. 167, not reported;)

B. Report and Order of Interstate Commerce Commission, dated October 3, 1962, in No. M. C. -106 398 (Sub.-No. 167), reported in 91 M. C. C. 301;

C. Memorandum Opinion and Order of the Three Judge District Court for the Northern District of Oklahoma, dated March 22, 1965, not reported;

D. Opinion and Order on Petition for Rehearing of the Three Judge District Court for the Northern District of Oklahoma, dated April 26, 1965, not reported.

Respectfully submitted,

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APPENDIX A

No. MC-106398 (Sub.-No. 167)

REPORT AND ORDER
RECOMMENDED BY WM. R. TYERS,
HEARING EXAMINER

By application filed December 19, 1960, as amended, National Trailer Convoy, Inc., Tulsa, Okla., seeks a certificate of public convenience and necessity authorizing operation, in interstate and foreign commerce, as a common carrier by motor vehicle, over irregular routes, of portable buildings, set up, or portable building sections, set up, with or without furnishings or equipment such as laundry machines, transported on shipper's undercarriages, equipped with axles and wheels, from Boca Raton, Clearwater, Jasper Lake City and points within 5 miles thereof, Ocala, Tampa, and Sebring, Fla., and points in Alabama and Georgia, in truckaway service, to points in the United States except points in Alaska and Hawaii; and shipper's undercarriage, on return.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on March 27, 1961 at Atlanta, Ga. Morgan Drive-Away, Inc., Pre-Fab Transit, Inc., Whitehouse Trucking, Inc., Superior Trucking Co., Inc., and specified members of Associated Heavy-Specialized Carriers, hereafter called Morgan, Pre-Fab, Whitehouse, Superior and Associated respectively, oppose the granting of the application. Bell Transportation Company, Inc., and

J. H. Rose Truck Line, Inc., entered appearance in opposition but withdrew such opposition subsequent to an amendment of the application made at the hearing.

Following the direct examination of its operating witness, applicant moved for dismissal of the application based upon the contention that its present authority includes the right to transport the traffic described in the application, as amended, and in the manner therein described. Morgan joined in the motion. Whitehouse, Superior and Associated oppose the granting of the motion. It was taken under advisement by the examiner.

Applicant's principal business is the movement of trailers throughout the continental United States under numerous appropriate certificates. As of interest here, applicant holds authority, inter alia, to transport commercial trailers, house trailers, cabin trailers, bungalow trailers, trailers containing special equipment, and special purpose trailers, in secondary movements, in truckaway service, between points in the United States; and trailers designed to be drawn by passenger automobiles, in initial movements, in truckaway service, from those specified points in Florida shown in the amended application, and points in Georgia and Alabama, to points in the United States, except Mount Clemens, Detroit, and Flint, Mich. Such authority was issued prior to January 3, 1959 and hence reference to United States in the territorial description therein does not include Alaska. *Interpretation of Operating Rights—Alaska,* 81 M. C. C. 701.

Applicant's personnel, including lessors and drivers, exceeds 750. It operates approximately 500 pieces of equipment most of which are under long term lease from owners who serve as drivers. It has 150 terminals throughout the United States, which include 4 in Alabama, 12 in Florida and 6 in Georgia. The equipment at these terminals principally includes light trucks having short wheel base and equipment for towing trailers with hitch ball attachments. Its safety program includes a safety director who is an accredited member of the National Safety Council and has spent many years in safety work. He maintains a rigid program of supervising the activities of the drivers as well as the proper screening of the prospective employees who will serve as drivers. As of December 31, 1960, applicant's current assets exceeded $346,000 and its current liabilities were less than $341,000 with retained earnings exceeding $187,000. During 1960 applicant's operating revenues exceeded $5,000,000, with net income before taxes in excess of $180,000.

Applicant here seeks interpretation of its existing authority, as stated. It now is transporting such articles as motel units and chicken houses constructed on undercarriages of shippers. Such under carriages are equipped with springs, axles, wheels and so-called hitch-balls for attachment to the towing power vehicles, and are of the type used in the transportation of trailers coming under the Commission's long recognized description: Trailers designed to be drawn by passenger automobiles. These structures are designed for portability and are integrated with the described under carriages during the process of

manufacture and when tendered to applicant for transportation; they are transported and delivered thereon by applicant after which the wheels and undercarriage may or may not be removed therefrom for return to the shipper in accordance with the shippers' instructions. Such transportation, at least in part, has been the subject of informal criticism by a field representative of the Commission as not falling within applicant's heretofore described authority. It is continuing the performance of such transportation, however, and contends, as stated, that present authority covers. It will cease such performance if and when it is authoritatively advised by the Commission that it is unlawful or, if specific authority therefor is granted, in accordance with this application, it will continue such operations in compliance therewith.

Supporting Shippers' Evidence

Shrimp Boats, Inc., hereafter called Shrimp, with headquarters at Macon, Ga., has operated since August, 1958, a carry-home food business which includes the manufacture and distribution of a unit enclosed in a house trailer shell or frame 47 feet long and 10 feet wide equipped with facilities for cooking sea foods and poultry. These units are constructed with undercarriage and hitch ball for towing to the site of the retail business operation. The units are there placed on blocks and undercarriage removed and returned to Macon by Shrimp's trucks which are used to transport a portion of the interior equipment and advertising material and signs to the site. Its own truck will accompany all movements for the

purpose indicated but it desires experienced drivers of applicant for movement of the basic unit. Should the chosen site not prove favorable, Shrimp will bring its undercarriage with its truck to the site, placing the structure on it, remove the removable interior equipment, and the exterior signs and advertising material from the unit and request applicant to tow the structure to another site. The completed unit weighs approximately 9,000 pounds. Sixteen were in operation at the time of the hearing. Five or six units had been moved from their original locations. Approximately one unit is manufactured every three weeks and Shrimp expects to place units at points throughout the nation and supports the application from Macon thereto.

L. A. Pockman Manufacturing Company, Decatur, Ala., hereafter called Pockman, manufactures for the poultry industry, a mobile egg factory, which consists of a house trailer chassis, and a 10 by 40 foot house trailer shell mounted thereon in which is placed equipment for the accommodation of approximately 1,000 hens for the production and preparation for market of eggs. It has forwarded 36 such units to various points throughout the country. The completed units weighs approximately 10,000 pounds. Pockman's plant has a capacity of 8 per week. These units which have been tendered to applicant, mounted on Pockman's under carriage which remains on the unit at the site of its customer's operation. Pockman finances the sales of these units and when repossession is necessary, the unit would be moved to another location by applicant.

Ed Massey Associates, Macon, Ga., manufactures portable buildings as coin operated laundries. The unit is constructed on a 6 inch channel frame mounted on a three axle undercarriage and equipped with a hitch ball for towing. The necessary plumbing and wiring for 16 to 20 washers and 5 to 8 dryers is installed in a house trailer shell 10 by 50 feet. The unit when completed, weighs approximately 15,000 pounds. After the unit arrives at destination, it is placed on a foundation or slab with under carriage removed and the washers, dryer, and exterior advertising material and signs are installed.

The American Coach Company, Milledgeville, Ga., manufactures movable homes and motel units. Two types of motel units are manufactured, one 12 by 30 and another 12 by 55 feet. These units are assembled on 2- or 3-axle undercarriages, equipped with hitch balls. In many instances when the unit is placed along side another, for occupancy in a motel site, the undercarriage is not removed. Among other things the retention of mobility results in a property tax advantage in some States, in Florida, for example. Moreover, the motel units can then be readily moved to other locations if anticipated trade does not develop. Finance companies make larger loans, at lower interest rates, on movable motel units than they do on stationary ones and the retention of the undercarriage is recommended by the manufacturer as it prevents the sagging of door and window frames. The motel units have been manufactured at American's Michigan plant, but the Milledgeville plant had a contract for 60 units for delivery in the southeast on which construction would begin

shortly after the close of the hearing. These motel units range in weight from 7,000 to 13,000 pounds and are completely equipped with beds, furniture, fixtures, draperies, water heater, and room heating and cooling units. They are not sectionalized and are not sold as prefabricated buildings. After placement side by side at destination a false front is placed in front of a row of them and paved walks are constructed along the row thus constituting the whole as a complete motel. American has used the services of protestant Morgan in addition to those of applicant. Pace Maker Corporation of Ocala, Fla., was scheduled to begin the manufacture of motel units similar to those which are manufactured by American. Both of these shippers support the application.

Vagabond Coach Manufacturing Company, with a plant at Alexander City, Ala., has been engaged in the manufacture of mobile homes for 30 years. It is promoting the sale of a portable home which is moved in 2 units, each completely finished, one containing living room and bedroom and the other containing kitchen, bath, and other appurtenances. These structures are built separately and move on two separate undercarriages equipped with hitch balls. When they arrive at the site they are merely placed together, side by side, and attached to form a completed house approximately 42 by 20 feet. The undercarriages are removed and returned to shipper. Six such homes have been transported in private carriage.

Vought Industry, a subsidiary of Chance Vought Corporation, is locating a plant in the vicinity of Atlanta, Ga. One of its products is a sectional movable home similar to,

and transported in the same manner as, the one produced by Vagabond. Knox Homes Corporation, Thompson, Ga., manufactures a movable home in two units produced and transported in a manner similar to those made by Vagabond and Vought, except that after arrival at the site of the building, one completed unit is placed on the top of the other completed unit to make a two story home. All plumbing, heating and electrical facilities are in place.

Opposing Evidence

Superior holds authority to transport commodities, which because of their size or weight, require the use of special equipment between points in 17 States including Georgia, Florida, and Alabama. It has interchange arrangements with other carriers holding similar authority. Superior is in position to transport such authorized commodities between all points in a number of States. It participates in the transportation of trolly cars, lunch wagons and other buildings, none of which are equipped with or shipped on undercarriages. The equipment operated by Superior is confined to low-boy trailers and facilities for loading on and unloading buildings from such vehicles as here of interest. If it participated in the transportation of structures as described herein, it would be necessary to remove the undercarriage therefrom in order to load them on Superior's trailers and then they would require unloading at destination with additional labor costs and time-consuming procedures.

Morgan holds pertinent authority similar to that held by applicant and, in addition, it is authorized to trans-

port prefabricated buildings, complete, knocked down or in sections between points in 22 named States. Morgan has a number of terminals throughout the country and operates over 600 pieces of power equipment suitable for towing such traffic. It also operates 100 low boy and flat-bed trailers. Morgan contends that it already holds proper authority to transport the traffic described in the supporting evidence and that where portable structures to be transported are integrated with undercarriages of relatively the same type used for the movement of mobile homes and which are tendered for transportation on wheels and axles and equipped with a hitch ball device for towing as integral parts of such units, such buildings should be classified as trailers designed to be drawn by passenger automobiles.

Pre-Fab holds authority to transport prefabricated buildings, complete, knocked down or in sections, between numerous points in the country including substantial portions of herein pertinent areas. Its equipment consists of 184 tractors and 345 trailers. At one time it transported buildings on undercarriages furnished by shippers, but all buildings presently transported by Pre-Fab are moved on flat-bed or low-boy trailers. Its opposition to the granting of the motion to dismiss is based on its contention that Pre-Fab is authorized and able to transport these structures; on undercarriages especially those moving in sections; that applicant's proposed service is not needed; and that the application should be denied. It regards all mass produced buildings which are not custom constructed at the site of use to be prefabricated and covered by its authority, whether or not shipped on underframes.

Whitehouse is authorized to transport prefabricated buildings, without limitation, between various widely dispersed points and areas including movements from the origins described in the amended application to points in several States. It transports buildings which are either completely set up, in sections, or knocked down, and operates 159 tractors, 268 trailers. Its basis of opposition is comparable to that of Pre-Fab.

Discussion and Conclusion

At the hearing, and on brief, reference is made by parties to a decision of division 5 made June 4, 1947, in *Illinois Trailer Convoy, Inc., Extension—All States*, 47 M. C. C. 315, 317, wherein the following conclusion appeared;

> "That term 'new trailers designed to be drawn by passenger automobiles' has been used by us in recent proceedings to distinguish between so-called house trailers and commercial trailers, the latter term being indefinite since many house trailers are equipped for commercial purposes. It comprehends the various types of house trailers however equipped, including those specifically listed by applicant, and no good reason has been shown why it should not be employed in any grant of authority herein. It is merely descriptive of the articles to be transported and does not, as contended by applicant, require the motive power utilized by applicant to tow a trailer in the course of for-hire transportation to be furnished by a passenger automobile."

In that proceeding the applicant had sought authority to transport, in truckaway service, as pertinent here,

house trailers, cabin trailers, bungalow trailers, trailers containing special equipment, and special purpose trailers. The examiner therein recommended a grant of authority, as pertinent, to transport: Trailers designed to be drawn by passenger automobiles, in truckaway service. On exceptions applicant therein contended, among other things, (1) that the naming of the various type trailers shown in the application would be more definite and desirable than the generic term, trailers, shown in the examiner's findings, and (2) that the limitation to "trailers designed to be drawn by passenger automobiles," was inappropriate because such trailers would be towed not only by passenger automobiles, but by half-ton pick-up trucks, and by straight trucks. As will be noted, the quoted conclusions of division 5 in overruling the exceptions were that the description excepted to was sufficiently comprehensive in scope to cover various pertinent type of mobile structural trailers however equipped, and regardless of the specific type of vehicle used for towing.

The phrase "trailers designed to be drawn by passenger automobiles," had been previously used by the Commission and has been used in general by the Commission since the *Illinois Trailer Convoy* case, in certificates which authority was sought to transport such portable structures as house trailers, cabin trailers, camp trailers, coach trailers, display trailers, laboratory trailers, kitchen trailers, and other trailers built for special use and purposes, for the purpose of distinguishing between freight carrying trailers or semi-trailers which are usually attached to road tractors by so-called "fifth wheel" connections or

otherwise, excluding those moved on undercarriage equipped with hitch ball connections. Such freight-carrying trailers are in general, with exceptions not here important, denominated in certificates as: Trailers *other than those* designed to be drawn by passenger automobiles.

Thus these 2 descriptions have established 2 broad comprehensive mutually exclusive categories in the issuance of motor carrier authority to transport this generic type of traffic integrated with, tendered on, transported on, and delivered on, wheels which are part of the shipment. For examples, see No. MC-103993 (Sub.-No. 13) *Morgan Drive-Away Inc., Extension—Trailers—All States*, 46 M. C. C. 859 not printed, decided January 14, 1947, *Newkirk Common Carrier Application* 66 M. C. C. 279, No. MC-4405 (Sub-No. 347) *Dealers Transit, Inc., Extension—Augusta, Kans.*, 86 M. C. C. 571, decided July 26, 1961.

It also has been at least tacitly recognized by the Commission, in the light of facts shown in many pertinent records, that undercarriages are sometimes removed at destination where trailers are placed on sites for use over an extended period, or for other reasons, and that such removal does not change the status of the transportation as coming within the description prescribed in the *Illinois Trailer Convoy* case supra.

The examiner agrees with the contention of applicant, on brief, that by usage and interpretation the Commission has established the description: "trailers designed to be drawn by passenger automobiles", as words of art in the subject industry, which are intended to cover practically

every type of *structural* trailer having portability other than freight-carrying trailers, generally known as truck trailers; and that this description is not to be construed literally either as to size of trailer or actual type of power vehicle employed in the movement thereof. It is acknowledged by the Commission and the industry that the steadily increasing size of many trailers of the subject type renders it impracticable to draw them with a passenger automobile, but the Commission's interpretation placed on the cited description, as stated, dispenses with literal compliance with such terms of the description. The term "mobile homes" has more recently been used in the grant of authority in some instances where it is sufficiently broad to encompass the service found to be justified by the evidence in an individual application. Such grants, however, are not regarded as a significant departure from the pertinent terms used in general since the decision in the *Illinois Trailer Convoy* case, and heretofore discussed somewhat at length.

The examiner has little difficulty in deciding that the so called shrimp boats, egg factories and coin operated laundries, when transported in the manner disclosed in the evidence obviously come within the intent of the description approved by the Commission in the *Illinois Trailer Convoy* case supra, by their inherent characteristics as "special purpose" trailers. Turning now to the motel units and to the sectionalized manufactured homes. The evidence shows that it would be highly impracticable to transport these structures of record in the same manner as conventional prefabricated homes are handled by their

manufacturers and transporters. The entire concept of production of these homes is based on the construction upon, and integration with, mobile home type undercarriages for efficiency in production and, for ease of movement by towing to site of use. These homes and sections thereof are completely finished and equipped for their ultimate use. It appears obvious that by analogy and reasonable standards of interpretation or construction, in the light of past pertinent determinations of the Commission, as heretofore related, these portable structures tendered for shipment upon undercarriages of the shipper who so mounts them, and transported to destination by towing thereon with a hitch ball attachment, should be appropriately described as trailers designed to be drawn by passenger automobiles.

Pursuant to the foregoing discussion the examiner concludes that the traffic described by supporting shippers herein, tendered and transported on undercarriages equipped with wheels, axles and hitch balls, is embraced in the authority which applicant holds to transport: Trailers designed to be drawn by passenger automobiles, in truckaway service, in initial movements, from the origins named in the amended application to the destinations described therein, except points in Alaska. No opinion is expressed as to secondary movements where the existing authority between points in the United States is set forth in different terms, as stated. It will be recommended that the application be dismissed.

Morgan has initial, truckaway authority identical with the pertinent initial truckaway authority held by appli-

cant as heretofore described herein and, in addition, is authorized to transport: Trailers designed to be drawn by passenger automobiles, in secondary, truckaway service between all points in the United States other than those in Hawaii and Alaska. Under the conclusions of the examiner herein it could of course lawfully transport the traffic in issue.

It should be noted that none of the remaining protestants has authority to transport: Trailers designed to be drawn by passenger automobiles, by towing in truckaway service. Compare *Interstate Van Service, Ext.—Trailers & Passengers,* 62 M. C. C. 325. It would therefore appear that they are without authority to transport the disputed traffic.

Although the application is not limited to initial movements by its terms, the primary evidence adduced is directly related to certain initial authority now held and the application will be considered as amended to conform to the evidence, contentions, and arguments of applicant, thus, in a sense, narrowing the issues. It is concluded that the evidence adduced would not support a grant of additional authority in any event.

In the light of the Commission's decision in *P. B. Mutrie Motor Transp., Inc., Ext.—Benzyl Chloride,* 83 M. C. C. 123, 132, with respect to the return of shipper-owned trailers to the point of origin in connection with an authorized outbound movement, it is concluded that the return of shippers' undercarriages in the manner described in the supporting evidence herein may be performed without specific authority.

The examiner finds that applicant's existing authority to transport trailers designed to be drawn by passenger automobiles, in initial movements, in truckaway service, from specified points in Florida as described in the amended application, and points in Alabama and Georgia, to points in the United States except those in Alaska and Hawaii, includes authority to transport the portable buildings and structures described in the supporting evidence as detailed in the report, in the manner therein described, and the return of shippers' trailer undercarriages; and that the application therefore should be dismissed.

It is recommended that the appended order be entered.

By Wm. R. Tyers, Hearing Examiner.

(Signature) Wm. R. Tyers

APPENDIX B

M-10719

INTERSTATE COMMERCE COMMISSION
No. MC-106398 (Sub-No. 167)

NATIONAL TRAILER CONVOY, INC., EXTENSION—
PORTABLE BUILDINGS

Decided October 3, 1962

1. Certain commodities embraced by the application found to be authorized by applicant's existing certificates.
2. Public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of specified commodities from points in Georgia, Alabama, and Florida to points in the United States, except Alaska and Hawaii. Application denied.

Harold G. Hernley and *W. T. Croft* for applicant.

Robert W. Loser, John E. Lesow, James E. Lesh, Ernie Adamson, F. H. Floyd, and *R. J. Reynolds III* for protestants.

REPORT OF THE COMMISSION

Division 1, Commissioners McPherson, Bush, and Tucker

McPherson, *Commissioner*:

Joint exceptions to the order recommended by the examiner were filed by protestants, Whitehouse Trucking Inc., and Pre-Fab Transit Co., and applicant and Morgan Drive-Away, Inc., replied. Our conclusions differ in part from those recommended.

By application filed December 19, 1960, as amended, National Trailer Convoy, Inc., Tulsa, Okla, seeks a certificate of public convenience and necessity authorizing operation, in interstate and foreign commerce, as a common carrier by motor vehicle, over irregular routes, of portable buildings set up or portable building sections set up, with or without furnishings or equipment such as laundry machines, transported on the shipper's undercarriages, equipped with axles and wheels, from Boca Raton, Clearwater, Jasper, Lake City and points within 5 miles thereof, Ocala, Tampa, and Sebring, Fla., and points in Alabama and Georgia, in truckaway service, to points in the United States except points in Alaska and Hawaii; and the shipper's undercarriages used in transporting the commodities specified above, on return. The application is opposed by Whitehouse, Pre-Fab, Morgan, Superior Trucking Co., Inc., and by Associated Heavy-Specialized Carriers. Bell Transportation Company Inc.; and J. H. Rose Truck Lines, Inc., withdrew their opposition upon amendment of the application.

At the hearing applicant moved for dismissal of the application on the grounds that it is presently authorized to transport the considered traffic. Morgan joined in the motion to the extent that it holds the same authority. Whitehouse, Superior, and Associated opposed the motion. The examiner, not being empowered under our rules of practice to dismiss applications, did not rule on the motion but recommended in his order that the application be dismissed. He found that applicant's existing authority to transport trailers designed to be drawn by passenger auto-

mobiles, in initial movements, in truckaway service includes authority to transport the portable buildings and structures produced by the supporting shippers and described in the appendix, and that shipper-owned trailer undercarriages may be returned to the points of origin without specific operating authority therefor.

On exceptions Whitehouse and Pre-Fab jointly contend that the examiner erred (1) in finding that applicant is presently authorized to transport the considered traffic; (2) in concluding that protestants, except Morgan, are without such authority; and (3) in concluding that the Commission by usage and interpretation has established in motor carrier operating authorities the description, "trailers designed to be drawn by passenger automobiles," as words of art in the subject industry, which are intended to cover practically every type of trailer other than freight-carrying trailers. In their separate replies applicant and Morgan contend that the examiner's conclusions are supported by the evidence and by the Commission's past decisions, and that his recommendation to dismiss the application should be affirmed.

The evidence adduced, the examiner's recommendation, the exceptions, and the replies thereto have been considered. We find the examiner's statement of facts to be accurate in all material respects, and we adopt that statement as our own. That statement of facts is set forth in the appendix hereto. The facts will be restated here solely to the extent necessary for clarity of discussion.

Applicant requests that concurrent consideration be given to this proceeding and to its application proceeding

in No. MC—106398 (Sub-No. 184) which involves similar issues. Determination of the issues herein does not require consideration of the matters involved in applicant's other proceeding. Therefore this request will not be granted.

Applicant holds authority to transport certain related commodities, in secondary movements, between points in the United States. Because the commodity description in this secondary authority is stated differently from that at issue here, and because the record was not developed with respect thereto, the examiner declined to discuss the interpretation of such secondary authority. No exception is taken to his recommendations in this respect and our discussion of the interpretive problems herein will be limited to applicant's authority to perform initial movements in the transportation of trailers designed to be drawn by passenger automobiles from presently authorized points in Florida, Georgia, and Alabama to points in the United States excluding Hawaii and Alaska.

DISCUSSION AND CONCLUSIONS

The first issue presented for determination is whether the authority presently held by applicant and protestant Morgan Drive-Away, Inc., to transport "trailers designed to be drawn by passenger automobiles" embraces the transportation of the commodities described by the supporting shippers in the manner proposed. We must also determine whether any or all of the considered commodities may be transported by protestants Morgan, Pre-Fab, and Whitehouse under their certificates authorizing the transportation collectively of buildings, prefabricated

buildings, complete, knocked down or in sections, and component parts of such buildings. Finally, we must determine whether a need has been shown for any of the proposed service.

At the outset we agree that determination of the issues herein depends to a large extent upon the two generic descriptions of trailers which have evolved in the issuance of motor carrier certificates; namely, those designed to be drawn by passenger automobiles and those not so designed. The first category includes the various types of house trailers however equipped, including those equipped for commercial purposes, towed by motive power furnished by passenger automobiles or by other means such as light trucks. See, *Illinois Trailer Convoy, Inc., Extension—All States*, 47 M. C. C. 315, 317. The second category embraces not only those trailers formerly referred to as commercial freight trailers commonly used for the transportation of property placed thereon from place to place, but that type of trailer adapted to other uses such as missile trailers, shop trailers, tank trailers, and electronic trailers. See *Dealers Transit, Inc., Ext.—Clarification, Augusta, Kans.*, 88 M. C. C. 369. Compare *Kenosha Auto Transport Corp. Extension—21 States*, 62 M. C. C. 446. However we are not persuaded to the views of applicant and the examiner that all traffic integrated with, tendered on, transported on, and delivered on wheels which are a part of the shipment brings that traffic automatically within the descriptions in either of the two stated categories. Compare *Arco Auto Carriers, Inc., Extension—Escanaba, Mich.*, 86 M. C. C. 555.

The primary problem before us is whether the traffic described by supporting shippers herein properly can be described as trailers. As seen the structures described as shrimp boats are mobile kitchens 47 feet long and 10 feed wide constructed in a house trailer shell with an undercarriage and wheels attached to a hitch ball connection with the towing vehicle. The shipper intends to demount and retain the undercarriages upon delivery. The mobile egg factories are constructed in house trailer shells on a house trailer chassis, which will remain with the unit when delivered to the consignees. The portable coin-operated laundries are constructed in like manner and the washers and dryers installed thereon after delivery by the carrier at which time the undercarriages are removed and returned to the shipper. Each mobile motel unit is a self-contained structure although intended to be placed side by side with a varying number of like units to form a motel. The undercarriages which contribute to their structural integrity remain with the units. In our opinion these structures can be properly described as trailers designed to be drawn by passenger automobiles particularly as they enjoy the same substantial characteristics as house trailers which were the subject of our prior decisions. See *Illinois Trailer Convoy, Inc., Extension—All States, supra.* Compare *Interstate Van Service, Inc., Ext.—Trailers & Passengers,* 62 M. C. C. 325, and *Leonard Bros. Transfer & Storage Co., Ext.—Trailers,* 82 M. C. C. 623, 627.

The commodities described on this record as sectionalized manufactured homes are structures built separately in two sections and joined together side by side at des-

tination to form a complete house, or placed one on top of the other to form a complete two-story house. In each case the undercarriages are removed and returned to the shippers and the houses permanently situated at the points of destination. These houses, in two sections, are manufactured, advertised, and sold as factory-built homes. An advertising brochure distributed by the manufacturer points out that this type of structure embodies most of the architectural appointments of conventional housing, is manufactured in conformity with various building codes and thus acceptable for ready financing through FHA and conventional mortgage loans, and can be delivered complete to the prospective howeowner's lot. It seems clear that these structures do not possess the determinative characteristics of house trailers. They are not single units but become so only when joined together at destination to form a complete house. They are not sold to customers as mobile units designed to be drawn upon the highways as trailers but are merchandized as stationary, factory-built houses. The means of conveyance, the undercarriages and wheels, remain within the shippers' control and in this instance are nothing more than trailers transporting the actual commodity involved. We conclude therefore that these sectionalized houses are not embraced within applicant's operating authority to transport trailers designed to be drawn by passenger automobiles. Insofar as Morgan's operating authority embraces the considered commodities our conclusions are equally applicable.

Turning next to the question raised by protestants Pre-Fab and Whitehouse as to whether the involved com-

modities are authorized to be transported under their respective certificates, we conclude that both carriers are authorized to transport the houses herein described that are shipped in two or more sections on the shipper's wheeled undercarriages drawn by the towing vehicle by means of a hitch ball connection, since no limitations are to be found in their certificates against this mode of transportation. As pertinent Pre-Fab holds authority to transport buildings and prefabricated buildings, complete, knocked down, or in sections. Its authority was interpreted by the Commission, division 5, by order of April 29, 1952, entered in No. MC-107295, Pre-Fab Transit Co., a Corporation, Farmer City, Ill., which specified that the above commodity description does not authorize the transportation of buildings already constructed. Whitehouse is authorized to transport prefabricated buildings, and component parts of such buildings when shipped therewith. Thus, both of these carriers may transport the houses moved in two sections. However, we conclude that the remaining structures, considered here, have acquired separate identities as trailers and cannot be considered to be prefabricated buildings as that term is used in the carriers' certificates. Compare *Interstate Van Service, Inc., Ext.—Trailers & Passengers, supra.*

We have held above that applicant is authorized to transport all of the commodities described by supporting shippers except those which are considered to be prefabricated houses and that those can be transported by protestants. Applicant has not demonstrated any inability on the part of existing carriers to transport the commodities

they are authorized to haul. We conclude therefore that the public convenience and necessity do not require the service proposed in the application.

One further matter which should be considered here is the return of shipper-owned undercarriages to the points of origin in connection with the outbound movement of trailers found to be trailer designed to be drawn by passenger automobiles. The examiner concluded that the return transportation of these undercarriages can be performed without specific authority pursuant to the holding in *P. B. Mutrie Motor Transp., Inc., Etx.—Benzyl Chloride,* 83 M. C. C. 123, 132. We agree with the examiner's conclusions in this respect. The undercarriages returned by the carrier to the trailer manufacturer occupy a position analogous to that of shipper-owner trailers, or other shipping devices. That is, their return to the point of origin is merely incidental to the outbound service. We recognize that the undercarriage, outbound, constitutes an integral part of the trailer being transported. Nevertheless, we also recognize that it is a common practice in the industry to remove the undercarriage or wheels from trailers when they have been towed to a destination where it is anticipated that they will remain for some time. In such an instance, when the return of the undercarriage is part of a preconceived plan of the shipper at the time the outbound transportation is performed, the authorized carrier which performed the outbound service should also be allowed to return the undercarriage. Any other conclusion would place an unnecessary burden on carriers in this field of service by requiring them to seek appropriate authority for a movement

which is merely incidental to the authorized outbound movement and nesessary to the rendition of an efficient transportation service. Compare *Interpretation, Operating Rights—Returned Containers,* 82 M. C. C. 667.

We find (1) that applicant's existing authority to transport trailers designed to be drawn by passenger automobiles, in initial movements, in truckaway service from points in Florida as specified in the amended application, and points in Alabama and Georgia, to points in the United States, except those in Alaska and Hawaii includes authority to transport the trailers described in the supporting evidence as shrimp boats, egg factories, motel units, and coin-operated laundries, and also includes authority to return undercarriages from such trailers, when transported in the manner described, and that such existing authority does not include authority to transport the structures described in the evidence as sectionalized manufactured homes; (2) that protestants Pre-Fab Transit Co. and Whitehouse Trucking, Inc., are authorized to transport the houses moved in two sections, here considered, but not those structures, described above, which we have found to be trailers; (3) that applicant has failed to establish that the present or future public convenience and necessity require the transportation of any commodities not authorized under its presently held certificates; and (4) that the application therefore should be denied.

An appropriate order will be entered.

APPENDIX

EXAMINER'S STATEMENT OF FACTS

Applicant's principal business is the movement of trailers throughout the continental United States under numerous appropriate certificates. As of interest here, applicant holds authority, *inter alia*, to transport commercial trailers, house trailers, cabin trailers, bungalow trailers, trailers containing special equipment, and special-purpose trailers, in secondary movements, in truckaway service, between points in the United States; and trailers designed to be drawn by passenger automobiles, in initial movements, in truckaway service, from those specified points in Florida shown in the amended application, and points in Georgia and Alabama, to points in the United States, except Mount Clemens, Detroit, and Flint, Mich. Such authority was issued prior to January 3, 1959, and hence reference to United States in the territorial description therein does not include Alaska. *Interpretation of Operating Rights—Alaska*, 81 M. C. C. 701.

Applicant's personnel, including lessors and drivers, exceeds 750. It operates approximately 500 pieces of equipment most of which are under long-term lease from owners who serve as drivers. It has 150 terminals throughout the United States, which include 4 in Alabama, 12 in Florida, and 6 in Georgia. The equipment at these terminals principally includes light trucks having a short wheel base and equipment for towing trailers with hitch ball attachments. Its safety program includes a safety director who is an accredited member of the National Safety

Council and has spent many years in safety work. He maintains a rigid program of supervising the activities of the drivers as well as the proper screening of the prospective employees who will serve as drivers. As of December 31, 1960, applicant's current assets exceeded $346,000 and its current liabilities were less than $341,000 with retained earnings exceeding $187,000. During 1960 applicant's revenues exceeded $5,000,000, with net income before taxes in excess of $180,000.

Applicant here seeks interpretation of its existing authority, as stated. It now is transporting such articles as motel units and chicken houses constructed on undercarriages of shippers. Such undercarriages are equipped with springs, axles, wheels, and so-called hitch balls for attachment to the towing power vehicles, and are of the type used in the transportation of trailers coming under the Commission's long-recognized description: Trailers designed to be drawn by passenger automobiles. These structures are designed for portability and are integrated with the described undercarriages during the process of manufacture and when tendered to applicant for transportation; they are transported and delivered thereon by applicant after which the wheels and undercarriage may or may not be removed therefrom for return to the shipper in accordance with the shippers' instructions. Such transportation, at least in part, has been the subject of informal criticism by a field representative of the Commission as not falling within applicant's heretofore described authority. It is continuing the performance of such transportation, however, and contends, as stated, that present authority

covers. It will cease such performance if and when it is authoritatively advised by the Commission that it is unlawful, or if specific authority therefor is granted in accordance with this application, it will continue such operations in compliance therewith.

SUPPORTING SHIPPERS' EVIDENCE

Shrimp Boats, Inc., hereinafter called Shrimp, with headquarters at Macon, Ga., has operated, since August 1958, a carry-home food business which includes the manufacture and distribution of a unit enclosed in a house trailer shell or frame 47 feet long and 10 feet wide equipped with facilities for cooking seafoods and poultry. These units are constructed with undercarriage and hitch ball for towing to the site of the retail business operation. The units are there placed on blocks and undercarriage removed and returned to Macon by Shrimp's trucks which are used to transport a portion of the interior equipment and advertising material and signs to the site. Its own truck will accompany all movements for the purpose indicated, but it desires experienced drivers of applicant for movement of the basic unit. Should the chosen site not prove favorable, Shrimp will bring its undercarriage with its truck to the site, place the structure on it, remove the removable interior equipment and the exterior signs and advertising material from the unit, and request applicant to tow the structure to another site. The completed unit weighs approximately 9,000 pounds. Sixteen were in operation at the time of the hearing. Five or six units had been moved from their original locations. Approximately one

unit is manufactured every 3 weeks, and Shrimp expects to place units at points throughout the Nation and supports the application from Macon thereto.

L. A. Pockman Manufacturing Company, Decatur, Ala., hereinafter called Pockman, manufactures for the poultry industry, a mobile egg factory, which consists of a house trailer chassis, and a 10 by 40 foot house trailer shell mounted thereon in which is placed equipment for the accommodation of approximately 1,000 hens for the production and preparation for market of eggs. It has forwarded 36 such units to various points throughout the country. The completed unit weighs approximately 10,000 pounds. Pockman's plant has a capacity of 8 per week. These units which have been tendered to applicant, mounted on Pockman's undercarriage which remains on the unit at the site of its customer's operation. Pockman finances the sales of these units, and when repossession is necessary, the unit would be moved to another location by applicant.

Ed Massey Associates, Macon, Ga., manufactures portable buildings such as coin-operated laundries. The unit is constructed on a 6-inch channel frame mounted on a three-axle undercarriage and equipped with a hitch ball for towing. The necessary plumbing and wiring for 16 to 20 washers and 5 to 8 dryers is installed in a house trailer shell 10 by 50 feet. The unit when completed, weighs approximately 15,000 pounds. After the unit arrives at destination, it is placed on a foundation or slab with undercarriage removed and the washers, dryer, and exterior advertising material and signs installed.

The American Coach Company, Milledgeville, Ga., manufactures movable homes and motel units. Two types of motel units are manufactured, one 12 by 30 and another 12 by 55 feet. These units are assembled on two- or three-axle undercarriages, equipped with hitch balls. In many instances when the unit is placed along side another, for occupancy on a motel site, the undercarriage is not removed. Among other things the retention of mobility results in a property tax advantage in some States, in Florida, for example. Moreover, the motel units can then be readily moved to other locations if anticipated trade does not develop. Finance companies make larger loans, at lower interest rates, on movable motel units than they do on stationary ones and the retention of the undercarriage is recommended by the manufacturer as it prevents the sagging of door and window frames. The motel units have been manufactured at American's Michigan plant, but the Milledgeville plant had a contract for 60 units for delivery in the Southeast on which construction would begin shortly after the close of the hearing. These motel units range in weight from 7,000 to 13,000 pounds and are completely equipped with beds, furniture, fixtures, draperies, water heater, and room heating and cooling units. They are not sectionalized and are not sold as prefabricated buildings. After placement side by side at destination a false front is placed in front of a row of them and paved walks are constructed along the row thus constituting the whole as a complete motel. American has used the services of protestant Morgan in addition to those of applicant. Pace Maker Corporation of Ocala, Fla., was scheduled to begin the manufacture of motel units similar to those which are

manufactured by American. Both of these shippers support the application..

Vagabond Coach Manufacturing Company, with a plant at Alexander City, Ala., has been engaged in the manufacture of mobile homes for 30 years. It is promoting the sale of a portable home which is moved in two units, each completely finished, one containing living room and bedroom and the other containing kitchen, bath, and other appurtenances. These structures are built separately and move on two separate undercarriages equipped with hitch balls. When they arrive at the site they are merely placed together, side by side, and attached to form a completed house approximately 42 by 20 feet. The undercarriages are removed and returned to the shipper. Six such homes have been transported in private carriage.

Vought Industry, a subsidiary of Chance Vought Corporation, is locating a plant in the vicinity of Atlanta, Ga. One of its products is a sectional movable home similar to, and transported in the same manner as, the one produced by Vagabond. Knox Homes Corporation, Thompson, Ga., manufactures a movable home in two units produced and transported in a manner similar to those made by Vagabond and Vought, except that after arrival at the site of the building, one completed unit is placed on the top of the other completed unit to make a two-story home. All plumbing, heating, and electrical facilities are in place.

OPPOSING EVIDENCE

Superior holds authority to transport commodities, which because of their size or weight, require the use of special equipment between points in 17 States including Georgia, Florida, and Alabama. It has interchange arrangements with other carriers holding similar authority. Superior is in position to transport such authorized commodities between all points in a number of States. It participates in the transportation of trolly cars, lunch wagons, and other buildings, none of which are equipped with or shipped on undercarriages. The equipment operated by Superior is confined to lowboy trailers and facilities for loading on and unloading buildings from such vehicles as here of interest. If it participated in the transportation of structures as described herein, it would be necessary to remove the undercarriages therefrom in order to load them on Superior's trailers and then they would require unloading at destination with additional labor costs and time-consuming procedures.

Morgan holds pertinent authority similar to that held by applicant and, in addition, it is authorized to transport prefabricated buildings, complete, knocked down or in sections between points in 22 named States. Morgan has a number of terminals throughout the country and operates over 600 pieces of power equipment suitable for towing such traffic. It also operates 100 lowboy and flat-bed trailers. Morgan contends that it already holds proper authority to transport the traffic described in the supporting evidence and that where portable structures to be transported are integrated with undercarriages of relatively the

same type used for the movement of mobile homes and which are tendered for transportation on wheels and axles and equipped with a hitch ball device for towing as integral parts of such units, such buildings should be classified as trailers designed to be drawn by passenger automobiles.

Pre-Fab holds authority to transport prefabricated buildings, complete, knockdown or in sections, between numerous points in the country including substantial portions of herein pertinent areas. Its equipment consists of 184 tractors and 345 trailers. At one time it transported buildings on undercarriages furnished by shippers, but all buildings presently transported by Pre-Fab are moved on flat-bed or lowboy trailers. Its opposition to the granting of the motion to dismiss is based on its contention that it (Pre-Fab) is authorized and able to transport these structures, on undercarriages, especially those moving in sections; that applicant's proposed service is not needed; and that the application should be denied. It regards all mass-produced buildings which are not custom constructed at the site of use to be prefabricated and covered by its authority, whether or not shipped on underframes.

Whitehouse is authorized to transport prefabricated buildings, without limitation, between various widely dispersed points and areas including movements from the origins described in the amended application to points in several States. It transports buildings which are either completely set up, in sections, or knocked down, and operates 159 tractors and 268 trailers. Its basis of opposition is comparable to that of Pre-Fab.

APPENDIX C

Civil Action No. 5976

MEMORANDUM OPINION AND ORDER

Before BREITENSTEIN, Circuit Judge, and DAUGHERTY and BARROW, District Judges.

BREITENSTEIN, Circuit Judge.

This action seeks to set aside a report and order of the Interstate Commerce Commission entered in its Docket No. MC-106398 (Sub-No. 167), National Trailer Convoy, Inc., Extension—Portable Buildings.[1] The Commission found that the certificate of National Trailer Convoy, Inc., plaintiff herein, did not authorize the transportation of commodities referred to as sectionalized homes and denied National's request for such authority.

National held various certificates issued by the Commission and granting the right to transport "trailers designed to be drawn by passenger automobiles." It applied for a certificate covering five items, viz.: shrimp boats (mobile kitchens or restaurants), egg factories (hen houses), coin operated laundries, motel units, and sectionalized homes. At the hearing and after the examination of its operating witnesses, National moved to dismiss the application on the ground that its existing certificate covered the commodities. The Hearing Examiner agreed and recommended dismissal of the application. Upon exceptions by two protestants the Commission affirmed except as to the sectionalized homes. National here

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1 The Commission Report is published at 91 M. C. C. 301.

complains that the Commission order is arbitrary and capricious and fails to follow Commission precedent on the interpretation of commodity descriptions.

The Hearing Examiner described the commodity in dispute thus:

> "[A] portable home which is moved in two units, each completely finished, one containing living room and bedroom and the other containing kitchen, bath, and other appurtenances. These structures are built separately and move on two separate undercarriages equipped with hitch balls. When they arrive at the site they are merely placed together, side by side, and attached to form a completed house approximately 42 by 20 feet. The undercarriages are removed and returned to the shipper."

In *Illinois Trailer Convoy, Inc., Extension*, 47 M. C. C. 315, 317, the Commission said that it used the term "trailers designed to be drawn by passenger automobiles" to distinguish between so-called house trailers and commercial trailers, that the term is merely descriptive of the articles to be transported, and that it does not require the motive power to be furnished by a passenger automobile. In the parlance of the industry the house trailer category is referred to as "hitch ball" and the commercial as "fifth wheel" because of the method used in connecting the trailer to the motive power.

In the instant case the Commission said that the primary problem was whether the commodities could be properly described as trailers. It held that the shrimp

boats, egg factories, coin-operated laundries, and motel units had the same substantial characteristics as house trailers and were within the category of "trailers designed to be drawn by passenger automobiles." As to the sectionalized homes the Commission pointed out that they were built in two sections which were joined together to make a house permanently situated at the point of destination. The Commission held that they did not possess the determinative characteristics of house trailers because they were not single units or mobile units and that they were not within National's operating authority.

The Commission has done no more than construe or interpret a certificate granted by it. The rule is that the interpretation or construction by the Commission of a certificate issued by it will be overturned by the courts only if clearly erroneous.[2]

In substance the argument of National is that the description "trailers designed to be drawn by passenger automobiles" is a generic term covering all hitch ball type trailers. The difficulty is that the phrase describes a class of trailers. To be within it the commodity must be a trailer.

The Commission has differentiated between shrimp boats, egg factories, coin-operated laundries, and motel units on the one hand, all of which are single units and retain mobility after delivery, and sectionalized homes, on the other hand, which are not single units and which are

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2. *Andrew G. Nelson, Inc.*, v. *United States*, 355 U. S. 554, 558-559; *Arrow Trucking Co.* v. *United States*, N. D. Okl., 181 F. Supp. 775, 777.

permanently located after delivery. The commodities in the first group are held to be trailers and those in the second group are not.

National says that intended use is irrelevant and that industrial usage is the criterion for bringing a commodity within a generic description. In the situation presented the industry which manufactures the sectionalized homes has placed them on integrated undercarriages which make unnecessary the loading and unloading of the home on and off flat bed, fifth wheel type, trailers by means of cranes. If this type of construction determines whether a commodity is a trailer, anything built with an undercarriage and a hitch ball is within the category.

National cites many decisions of the Commission relating to the commodity description here under consideration.[3] These show that by use of the description the Commission intended to provide a field of service flexible enough to embrace developments in the mobile home industry. They also show that newly developed commodities do not automatically come within the description because of a superficial resemblance or common characteristic. The identity of each new commodity must be examined to determine its proper classification.

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3. For example: *Consolidated Freightways Corp. of Delaware, Extension—Petrochemicals*, 92 M. C. C. 443; *Dealers Transit, Inc., Extension—Augusta, Kansas*, 86 M. C. C. 571, 88 M. C. C. 369; *Arco Auto Carriers, Inc., Extension—Escanaba, Mich.*, 86 M. C. C. 555; *Leonard Bros. Transfer and Storage Co., Inc., v. Dealers Transit, Inc.*, 82 M. C. C. 191; and *Kenosha Auto Transport Corp., Extension—21 States*, 62 M. C. C. 446.

Here we have a new commodity which is not built in single units and which is not intended to retain any mobility. The decision of the Commission that it is not a trailer is reasonable and not clearly erroneous. We agree with the government that a half-house in the process of delivery, though moving, is not a trailer but rather is half of a house.

The order of the Commission is affirmed. This opinion sufficiently states the findings of fact and conclusions of law of the court. Further findings of fact and conclusions of law are not necessary. The clerk will enter an appropriate judgment.

Dated this 22 day of March, 1965.

JEAN S. BREITENSTEIN
United States Circuit Judge

FREDERICK A. DAUGHERTY
United States District Judge

ALLEN E. BARROW
United States District Judge

APPENDIX D

OPINION AND ORDER ON PETITION FOR REHEARING

CIVIL ACTION NO. 5976

Before BREITENSTEIN, Circuit Judge, and DAUGHERTY and BARROW, District Judges.

PER CURIAM.

At the trial National argued that the commodity description in its certificate covered all hitch ball trailers. The petition for rehearing is on the narrower ground that the Commission's finding of no retained mobility is without record support.

The Commission held that the sectionalized homes were not trailers because they were not single units and because they did not retain mobility. The present argument accepts the multiple unit finding but challenges the finding as to mobility.

National had the burden of satisfying the Commission that the sectionalized homes are within its authority. Although the facts pertaining to mobility were presented only casually to the Examiner, substantial evidence supports the finding that these homes "are not sold to customers as mobile units designed to be drawn upon the highways as trailers but are merchandized as stationary, factory-built homes." *National Trailer Convoy, Inc., Extension—Portable Buildings*, 91 M. C. C. 301, 304. This finding justifies the conclusion that the sectionalized homes do not retain mobility after initial delivery.

We are asked to receive evidence of the development and operation of the mobile home industry since the hearing before the Examiner. National urges that such evidence will show retention of mobility and the public importance of available transportation for the repeated movement of the homes. Our review is confined to the record made before the Commission. *United States* v. *Jones*, 336 U. S. 641, 673, rehearing denied 337 U. S. 920; *Louisville & N. R. R.* v. *United States*, 245 U. S. 463, 466. If National believes that the Commission was wrong because important evidence was not brought to its attention, the appropriate remedy is to make a new application to the Commission which has the power and duty to grant relief if the evidence warrants the change. See *Tagg Bros.* v. *United States*, 280 U. S. 420, 445.

The petition for rehearing is denied.

Done this 26 day of April, 1965.

Jean S. Breitenstein
United States Circuit Judge

Frederick A. Daugherty
United States District Judge

Allen E. Barrow
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 373

NATIONAL TRAILER CONVOY, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, which affirmed a Commission holding that appellant's operating authority does not permit it to transport sectional prefabricated

homes (J.S. 34). Appellant's certificates authorize it to transport "trailers designed to be drawn by passenger automobiles" (J.S. 28). The Commission consistently has held that, even though the motive power is furnished by light truck rather than by automobile, such authority permits the transportation of many types of trailers mounted on undercarriages which are connected to the motive power by a "hitchball" device (J.S. 19-20, 29).[1]

Appellant filed with the Commission an application for authority to transport commodities described as "portable buildings" (J.S. 26), including "shrimp restaurants," coin-operated laundries, "egg factories," motels and "sectionalized manufactured homes" (J.S. 37-40). The latter, which are the subject of this litigation, are portable homes made and transported in two units, "each completely finished, one containing living room and bedroom and the other containing kitchen, bath, and other appurtenances" (J.S. 40). All these products are tendered by the manufacturer with undercarriages attached and are pulled by hitchball connection (*id.*, 11-12, 15-16).

During the hearing, appellant moved to withdraw its application, alleging that no new authority was necessary because its existing authority covered these structures (J.S. 26). The Commission ruled that the "shrimp restaurants," laundries, "egg factories" and motels constituted "trailers" as that term was used

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[1] The two methods of connecting a trailer to the motive power are by hitchball or by a so-called "fifth wheel" (J.S. 19-20). The former method is used for smaller trailers and the latter for large freight trailers.

in appellant's existing certificates, but that the sectional homes did not (J.S. 30-31, 34). It pointed out (1) that, unlike the other structures, the sectional homes were made as half-units, designed to be put together after delivery either by attaching the halves side-by-side or placing one on top of the other to form a two-story home; and (2) that these products are not sold to customers as mobile homes, but as stationary houses (J.A. 30-31). The Commission further held that such sectional homes could be transported by the protestants Whitehouse Trucking, Inc. and Pre-Fab Transit Co., which possessed specific certificate authority to transport prefabricated buildings, complete or in sections; and it denied appellant's application for a new certificate of public convenience and necessity to carry sectional homes, on the ground that appellant had not shown that the protestants could not transport the product (J.S. 31-33).

The three-judge district court affirmed the Commission's order. Noting that the courts will overturn the Commission's interpretation of its own certificate only if such interpretation is clearly erroneous (J.S. 45), the court held that the Commission's ruling that sectional homes are not "trailers" was reasonable and not clearly erroneous, since such homes are "not built in single units and * * * [are] not intended to retain any mobility" (J.S. 47). Upon petition for rehearing, the court (1) held that substantial evidence supports the Commission's conclusion that the homes do not retain mobility after initial delivery (J.S. 48); and (2) declined to receive additional evidence on this point, pointing out that if the appellant believed the

Commission erred because "important evidence" was not brought to its attention, the appropriate remedy was to make a new application to the Commission (J.S. 49).

ARGUMENT

This appeal presents only two narrow questions: (1) whether the Commission was clearly erroneous in ruling that appellant's certificate authority to transport "trailers designed to be drawn by passenger automobiles" does not cover sectional prefabricated homes; and (2) whether substantial evidence supports the Commission's finding that such homes were intended for permanent installation. Neither of these issues presents any substantial question; both were correctly decided by the court below; and there is no occasion for plenary review.

1. In construing the phrase "trailers designed to be drawn by passenger automobiles" in appellant's certificate, the Commission gave these words a practical interpretation designed to limit transportation thereunder to relatively complete and self-contained units that are intended to retain their mobility after transportation. As the Commission here indicated (J.S. 31), the critical question is whether the products are "sold to customers as mobile units designed to be drawn upon the highway as trailers [or] are merchandised as stationary, factory-built houses." The word "trailers" does not automatically cover every kind of structure that is mounted on an undercarriage; it is the character of the structure and not

the form in which it is tendered to the carrier for transportation, that determines whether it is a "trailer" within the foregoing certificate authority.

The district court pointed out (J.S. 45-46) that in the present case the Commission applied that distinction, since it "has differentiated between shrimp boats, egg factories, coin-operated laundries, and motel units on the one hand, all of which are single units and retain mobility after delivery [and therefore are 'trailers'], and sectionalized homes, on the other hand, which are not single units and which are permanently located after delivery [and therefore are not 'trailers']." The validity of the Commission's conclusion is further shown by the fact that the two protesting carriers have specific authority to transport prefabricated buildings, either complete or in sections; the existence of such certificates strongly indicates that appellant's more generalized authority does not cover such products. The Commission's interpretation of its own certificates is controlling upon the reviewing courts unless clearly erroneous (cf. *Nelson Inc.* v. *United States*, 355 U.S. 554, 558), and the district court was fully justified in sustaining the Commission's interpretation here.

2. The court below also properly upheld, as having adequate evidentiary support, the Commission's finding (J.S. 31) that the sectionalized prefabricated homes were intended for permanent installation. Thus, as the Commission noted (J.S. 31), a brochure published by one of the shipper-manufacturers (Ex. 5) stated that such homes embody most of the architectural appointments of conventional housing and

are manufactured to conform to most building codes. Moreover, the brochure pictured such homes upon an apparently permanent site with a paved driveway. In addition, although the manufacturers of the other types of structures involved in this proceeding testified that those products retain their mobility after installation (Tr. 56-57, 96-97, 102, 116), neither the manufacturers nor the other carriers of sectional prefabricated houses pointed to any similar feature of that product (see Tr. 117-139, 146-152, 171-183). There is no occasion for a second plenary review of this narrow factual determination.

CONCLUSION

For the foregoing reasons, we respectfully submit that this appeal presents no substantial question, and that the judgment of the district court should be affirmed.

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No. 373

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NATIONAL TRAILER CONVOY, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 373

NATIONAL TRAILER CONVOY, INC., *Appellant,*

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellant, National Trailer Convoy, Inc., received the Appellees' Motion to Affirm on the 23rd day of August, 1965, and pursuant to Rule 16, Paragraph 3 of the Rules of this Court, files this brief opposing the motion.

STATEMENT OF THE CASE

Appellant's jurisdictional statement contains a Statement of the Case and no useful purpose would be served by a restatement here.

ARGUMENT

The Motion to Affirm is based upon Rule 16, Paragraph 1(c) of the Rules of this Court and contends that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

1. THE COMMISSION'S DECISION IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE

One of the questions presented by this appeal (J. S. 2, Issue No. 1) concerns the responsibility of a United States Court in reviewing a United States Agency's action pursuant to the Judicial Review Provisions of the Administrative Procedure Act, 5 U. S. C., Section 1009, especially 5 U. S. C., Section 1009 (e) (B) (5). The pertinent provision of 5 U. S. C. Section 1009(e) reads as follows:

> ". . . (T)he reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence. . . ."

This Court in the case of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, noted the Pre-Administrative-Procedure-Act criticism of judicial review standards and examined the committee reports and reasons behind the Congressional enactment of the Administrative Procedure Act. At page 484 of the *Universal Camera Corp.* case appears the following observation:

> "The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence,' and indicate that courts are to exact higher standards 'in

> the exercise of their independent judgment' and on consideration of 'the whole record.' "

The "higher standards" were defined by this Court in a number of cases wherein this Court discussed what is meant by "substantial evidence." One of such cases is *N. L. R. B.* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, wherein, at page 300, this Court defined "substantial evidence" as follows:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

This definition was reiterated in the *Universal Camera Corp* case, *supra* at page 477.

In applying this test, a reviewing court, as well as the agency itself, must remember that the public is a third party in the proceedings and unrepresented except by the agency. It is the public convenience and necessity or interest that is at stake. The traditional civil court preponderance of the evidence test is inappropriate and when a poor record is all that is available to the agency, the agency must insist that further evidence be presented before it acts in the public interest. The following often quoted statement is found repeated in Terminal Charge on Order Bills of Lading Shipments, 315 I. C. C. 327:

> "They (administrative agencies) are not expected merely to call balls and strikes, or to weigh the evi-

> dence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in. . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. . . ."

Thus, it can be seen that the question is not whether the applicant or protestant involved in an I. C. C. matter should win, but whether the public has been adequately protected and its interests served by the Commission's findings. If neither the applicant nor the protestant produces substantial evidence to support an action, the Commission has a duty to carry out, and certainly public interest demands a further investigation and supplementing of the record.

It was noted in the *Universal Camera Corp.* case, *supra*, at page 491, where the court below misapprehended or grossly misapplied the standard this Court *will* intervene to assure proper judicial review of an agency's action.

The Three-Judge District Court below erred in its judicial review of an Interstate Commerce Commission interpretive ruling because of its misapprehension of the "substantial evidence" standard. Only a review of the

record with the available legal principles at hand will completely show the lower court's error.

Clearly the matter was presented to the Examiner on, and the Examiner agreed with, the contention that "all traffic integrated with, tendered on, transported on, and delivered on wheels which are part of the shipment brings that traffic automatically within" the description trailers designed to be drawn by passenger automobiles. The Commission subsequently added a new and different standard with respect to the interpretation of its certificates, *i. e.*, that any commodity to be a trailer designed to be drawn by passenger automobile must "retain mobility"; declared that the sectionalized mobile homes did not; and reversed its Examiner. *Thus, a standard was deemed critical which was not litigated at the hearing before the Examiner* and obviously not an issue upon which any evidence was presented intentionally one way or the other. Can it be said that the public interest is served by such after-the-hearing promulgation of issues?

The United States District Court (Three-Judge) for the Eastern District of Pennsylvania in *E. Brooke Matlack, Inc.* v. *U. S. and I. C. C.*, 119 F. Supp. 617 (D. C. E. D. Pa. 1954) reversed the commission and held as follows:

> "That the Interstate Commerce Commission has the right from time to time to change its policies cannot be questioned. The Supreme Court of the United States in the case of *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80-89, 63 S. Ct. 454, 87 L. Ed. 626, has decided that an agency may from time to time promulgate standards expressing a more

sensitive regard for what is right and what is wrong than those prevalent at a prior time. However, where, as here, an applicant relying in good faith upon previously determined standards, as expressed in previous written statements or conclusions of the agencies, acts in strict accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency determines upon new and perhaps more sensitive standards. This is all the more true where, as here, the applicant has stated in writing and unequivocally that it is in a position to meet such revised standards by competent evidence, if allowed the opportunity to do so.

* * * * * * *

"This request seems to us to be entirely reasonable. In fact, its denial impinges on due process. Having presented an application and having supported it by the quantity and quality of proof indicated as necessary by previous Commission decisions, applicant had in the opinion of the examiner fully sustained its burden. At that point its only burden was to sustain the findings of the examiner."

Appellant is one of the largest transporters of mobile homes in the United States. The transportation of mobile homes is a significant industry affecting interstate commerce. If the commodities involved actually do retain mobility, Appellant and the public face a chaotic situation. If they are placed in certain locations with the idea that should danger arise they can be moved, then the safety of these items is seriously endangered and the public interest is obvious. Appellants state, as they did before the court below, that if this issue had been raised at the hearing the proof would have shown these homes to have retained mobility.

The Commission reached a decision contrary to its own Examiner and based on inference alone or at most on the slenderest threads. The lower Court in its Opinion and Order on Petition for Rehearing (J. S. 48) stated that "the facts pertaining to mobility were presented only casually to the Examiner" and yet concluded that the Commission's reversal of its Examiner, by adding a new and unforeseen standard of interpretation without offering to permit or requesting evidence thereon, was based upon substantial evidence. This Court should give plenary consideration to determine whether the evidence here only "casually presented," when other issues were thought to be determinative, can be the substantial evidence required by the statute.

The Appellees' Motion to Affirm has been given close scrutiny, especially with regard to their contention that the findings of the Commission were supported by substantial evidence. (M. A. 5) Generally speaking, their examples represent grasping at straws. The only evidence located by Appellees was a tenuous inference from Exhibit 5, which was a brochure published by one of the shipper-manufacturers. The inference is unsupported by any direct testimony. The brochure contents were mere *advertising sales talk* by one manufacturer to attract customers by informing them of easy financing. Appellees ignore direct testimony by another of the manufacturers.

Appellees' Motion to Affirm contends that "neither the manufacturers nor the other carriers of sectionalized prefabricated houses pointed to any" retained mobility. (M. A. 6) Isn't this simply another way of stating that

there is nothing in the record as to mobility or lack of mobility and therefore there is a lack of substantial evidence on this point?

Appellees further contend, under point number 1 of their Motion to Affirm (M. A. 4), that "The Commission's interpretation of its own certificates is controlling upon the reviewing courts unless clearly erroneous. . . ." With this Appellant cannot disagree; but Appellees overlook the fact that if the Commission's interpretive ruling is not based upon substantial evidence *it is clearly erroneous.*

2. THE COMMISSION'S DISPOSITION OF THE APPLICATION WAS BASED UPON AN IMPROPER STANDARD

The promulgation by the Commission of the factor of "retained mobility" in its disposition of the application herein under consideration created a new and unforeseen standard and one which was not contemplated by applicant, appellant here, in the preparation and trial of its application. See *E. Brooke Matlack, Inc.* v. *United States et al.*, 119 Fed. Supp. 617 (1954).

The factor of retained mobility has no place in the interpretation of the certificate herein under consideration as its applicability to said certificate would create only chaotic and burdensome questions of interpretation to which neither the carrier nor the public at large has been heretofore subjected. The Commission, at page 33 of its report (J. S. Appendix B), took notice of the existing practices of the industry relating to the sale of so-called house trailers and their utilization for purposes of

permanent housing with the undercarriages (generally owned by the shipper or seller) being only a means of conveyance, saying:

> "We recognize that the undercarriage, outbound, constitutes an integral part of the trailer being transported. Nevertheless, we also recognize that it is a common practice in the industry to remove the undercarriage or wheels from trailers when they have been towed to a destination where it is anticipated that they will remain for some time. In such an instance, when the return of the undercarriage is part of a preconceived plan of the shipper at the time the outbound transportation is performed, the authorized carrier which performed the out bound service should also be allowed to return the undercarriage."

Thus, the Commission in the concluding paragraph of its own report patently contradicts its prior reliance upon the factor of retained mobility, all of which demonstrates a lack of due process which was extended to this appellant by the Commission. The District Court completely failed on judicial review to correct this patent error of interpretation.

As recently as June 23, 1965, the United States District Court, Southern District of Mississippi, Eastern Division, reversed the Interstate Commerce Commission in the matter of *Dixie Highway Express, Inc., et al.*, v. *U. S. and I. C. C., et al.*, ... Fed. Supp. ....., 16 F. C. C. 81, 749, admonishing the Commission for lack of consistency of its administrative rulings and adopting different standards for similar situations, finding such action to be arbitrary.

Even in its report on appellant's petition for rehearing, the District Court again sidestepped the basic question of the pertinency of the factor of retained mobility, concluding merely that the evidence of record did not substantiate any retained mobility on the part of the sectionalized homes here in question.

We contend that if the Court had given proper consideration to the pertinency of the mobility factor in the interpretive question herein, it would have been obliged to rule in appellant's favor. On the other hand, if the Court after due consideration of this question determined to rule in favor of the Commission, under the circumstances of applicant's past reliance upon the inapplicability of such factor due process would have required the Court to remand the application to the Commission for further hearing limited solely to the receipt of evidence of retained mobility on the part of the sectionalized homes here in question.

CONCLUSION

For the foregoing reasons, this Court should give plenary consideration to the issues presented by this appeal (1) to determine whether the evidence only "casually presented" can be the "substantial evidence" required by the statute upon which the Commission can reverse its own Examiner by adding a new and unforeseen standard of interpretation without permitting evidence thereon; and (2) to determine whether the new and unforeseen factor of retained mobility is inconsistent with prior rulings and arbitrary. Such a reversal is obviously based upon a finding on an issue not thought to be determinative by either the applicant, protestants or Hearing Examiner.

Respectfully submitted,

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